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Supreme Court of the United States

October Term, 1962

No. 70

IRVING J. WOLF, ROBERT H. DAVIDSON, RICHARD S. HULL and FREDERICK KATZENELL,

Petitioners,

against

ARNOLD A. WEINSTEIN, JEROME FRIED, NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC., *et al.*

In the Matter
of
NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC.,

Debtor.

BRIEF FOR RESPONDENT WILLIAM McK. SHONGUT

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

In Proceedings for the Reorganization of a Corporation (No. 27000)

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This is an appeal from a judgment of the Court of Appeals for the Second Circuit which "reversed the order in No. 27000 except as specified in this opinion. * * * On the petitions to review the order of the Referee in Bankruptcy,

the district court is directed to modify the order of October 5, 1957, in accordance with this opinion." (*In re Wolf, et al.* v. *Nazareth, etc.*, 296 F. 2d 670, 675.)

Respondent, William McK. Shongut (one of the "Margolis group") purchased 10 shares of Nazareth stock for which he paid $10,000.00 pursuant to a written agreement.

Under "bar orders" issued by the District Court, 41 stock claims were filed, including the five "Margolis" claims, all of which were referred to John E. Joyce, Referee in Bankruptcy, to hear and determine. In 1957, Referee Joyce tried the five stock-claims of the "Margolis group" alone. In a decision dated August 30, 1957, the Referee held that "(1) The issuance of stock other than to Zoloth and Soble (original issue of 20 shares) was void. (2) None of the claimants acquired any stock which had been validly issued to Malakoff. (4) An order should be entered disallowing the claim(s) of * * * William McK. Shongut, * * *. (6) No equity exists in favor of any of the claimants against the debtor." Upon the entry of the order disallowing the Shongut claim, a Petition for Review was promptly filed and submitted before District Judge Sugarman. The District Court never passed on this petition. Judge Sugarman then revoked the general reference to Referee Joyce with respect to the remaining 36 stock claims and undertook the trial thereof. The District Court, by order of December 8th, 1960, allowed all 36 claimants to participate in the estate according to the "net fair value of their respective investments." This order did not include nor dispose of the Shongut claim, then pending on review.

The judgment of the Court of Appeals made and entered on November 9, 1961, modified the order of the District Court and allowed 32 claims, confined to "those investors who paid for a participation in the Nazareth market by cash, check or credit" and limited "the allowed claims in terms of dollars rather than in invalidly issued shares."

The Court of Appeals then by-passed the District Judge and considered the rights of the Margolis group, holding:

Judge Moore:

> "Another group (the Margolis group) involved in a separate appeal (No. 26962) must be considered as potential participants. The Referee in Bankruptcy found no equity in favor of any claimant in this group, i.e., * * * William McK. Shongut (10 shares).
>
> "Despite the fact that the Margolis appeal relates directly only to the district court's order permitting a reopening of the proceedings as to this group, there is sufficient proof before this court to enable us to indicate our views as to the rights of these claimants (296 F. 2d 670, 676).

* * *

William McK. Shongut:

> "William McK. Shongut's 10 shares were acquired pursuant to an alleged agreement with Margolis whereby he delivered to Margolis, as attorney, his check for $10,000. Margolis deposited this check in his bank account and Margolis guaranteed Shongut an income on the stock of 20% a year for 6 years. Shongut actually had given this $10,000. to Margolis for investment in Nazareth. However, Margolis only gave by checks and cash $6,287.34 to Malakoff. Shongut, therefore, should be allowed $6,287.34; for the rest he must look to Margolis (296 F. 2d 674, 677)."

In the instant appeal the petitioners do not question the allowance of Shongut's claim. They seek a modification of the District Court's order of December 8, 1960 to the extent that each of the 36 stock-claimants be the owners of the stock arithmetically reduced in proportion, for a total authorized issue of 200 shares. A judgment on this basis will leave the Shongut claim undetermined.

Shongut actually paid $10,000 for 10 shares of Nazareth stock, pursuant to a written agreement, so that his claim must be allowed, either under the "net fair value" theory of the Examiner and adopted by the District Judge, or under the equitable principle adopted by the Court of Appeals. Shongut's purchase money reached Malakoff so that his rights are at least equal to, if not superior to, the 36 allowed claims.

The dollars actually paid to Malakoff as set forth in the findings of the Examiner and the trial court were gross sums paid by the individual investors, and included commissions paid. Shongut actually paid $10,000 for his ten shares. Margolis deducted his commission of $2,000* in his accounting with Malakoff. Shongut, therefore, should be allowed $8,287.34.

CONCLUSION

Respondent Shongut respectfully submits that if the "net fair value" theory of the District Court is affirmed he should be allowed the equivalent of his purchase in valid stock. If the "equitable principle" of the Court of Appeals is affirmed, the Shongut dollar allowance should be increased to $8,287.34.

Respectfully submitted,

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* Finding 8, Referee in Bankruptcy John E. Joyce, August 30th, 1957.